STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of N.A.E., INC, GENERAL PARTNER, ET AL. D/B/A NASSAU SPORTS for Revision of a Determination or for Refund of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law for the Period June 1, 1985 through May 31, 1988.	:	
In the Matter of the Petition of ROBIN PICKETT, PARTNER OF NASSAU SPORTS for Revision of a Determination or for Refund of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law for the Period June 1, 1985 through May 31, 1988.	:	DETERMINATION DTA NOS. 810045, 810046, 810210
In the Matter of the Petition of NASSAU SPORTS, N.A.E., INC., ET AL. PARTNERS for Revision of a Determination or for Refund of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law for the Period June 1, 1985 through May 31, 1988.	:	

Petitioners N.A.E., Inc., General Partner, et al. d/b/a Nassau Sports and Nassau Sports, N.A.E., Inc., et al. partners, Nassau Coliseum, Uniondale, New York 11553, filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1985 through May 31, 1988.

Petitioner Robin Pickett, partner of Nassau Sports, 1768 South Ocean Boulevard, Palm

Beach, Florida 33480, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1985 through May 31, 1988.

A joint hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 16, 1992 and continued to completion on December 14, 1992. The Division of Taxation did not file a brief. Petitioners filed a brief on March 26, 1993 and a supplemental brief on June 10, 1993 which started the six-month statutory period for issuance of a determination. Petitioners appeared by David Steckler, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals has subject matter jurisdiction over the petition of "Nassau Sports, N.A.E., Inc. et al. Partners".

II. Whether petitioner Robin Pickett is a person responsible for collection and payment of sales and use taxes on behalf of Nassau Sports.

III. Whether the renovation of an electronic scoreboard was exempt from the sales tax imposed on the installation, repair and maintenance of tangible personal property by Tax Law § 1105(c)(3) because the scoreboard was the property of Nassau County or, alternatively, because the renovation involved the installation of tangible personal property which became a capital improvement to real property after installation.

IV. Whether work performed by J.H. Electric Corporation constituted a capital improvement to real property or the installation of tangible personal property.

V. Whether petitioners are liable for payment of tax imposed by Tax Law § 1105(f)(1) on certain admission charges to a place of amusement.

FINDINGS OF FACT

Nassau Sports ("Sports") is a New York limited partnership formed in 1972. It is the sole owner of the New York Islanders, a National Hockey League hockey team. Petitioner

N.A.E., Inc., is Sports' only general partner, and petitioner Robin Pickett is Sports' only limited partner.

The County of Nassau, a municipal corporation, owns the Nassau Veterans Memorial Coliseum (the "Coliseum") which is used for the conduct of sporting and entertainment events. Sports has leased the Coliseum from Nassau County since 1972. The Coliseum is also leased to other entities for the conduct of various sporting events and performances.

The Division of Taxation ("Division") conducted a sales tax field audit of Sports which resulted in the issuance of three notices of determination and demands for payment of sales and use taxes due, each dated September 20, 1989. Each notice assessed sales and use taxes in the amount of $168,034.45 for the period June 1, 1985 through May 31, 1988 plus penalty and interest. Notice number S890920001N ("001") was issued to "Nassau Sports NAE et al., partners", Federal identification number 112254417. Notice number S890920002N ("002") was issued to "NAE Inc., as general partner et al, d/b/a Nassau Sports", Federal identification number 112254417. Notice number S890920003N ("003") was issued to "Robin Pickett, as partner Nassau Sports". Notice numbers 002 and 003 contain the following statement:

> "You are liable individually and as partner of Nassau Sports under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with section 1138(a) of the Tax Law."

Two requests for a conciliation conference were filed in connection with these assessments. One was filed for N.A.E. Inc. as general partner d/b/a Nassau Sports d/b/a New York Islanders Hockey Team, and one was filed for Robin Pickett as partner in Nassau Sports. A request was not filed in connection with notice number 001.

The Division placed in evidence two copies of United States Postal Service form 3811, a certified mail receipt, or green card as it is commonly called. One of the forms shows that an article of mail addressed to "Nassau Sports NAE et al, partners" at the Nassau Coliseum was delivered on October 3, 1989 and received by a K. Johnson. The second form shows that an article of mail addressed to NAE Inc, as general partner et al, at the Nassau Coliseum, was received by "Pat Arign" (the date of receipt is not shown). In an affidavit signed by Lance Elder

who was employed by Spectacor Management Group ("Spectacor") as the Assistant General Manager of Nassau Coliseum, "K. Johnson" is identified as a receptionist for Spectacor, a corporation with its offices in the Coliseum. Spectacor and Sports are not related companies. According to the affidavit of William M. Skehan, the general counsel of Nassau Sports, assessment number 001 was never received by any agent or employee of Nassau Sports which first became aware of the assessment when a warrant was filed in 1991. A copy of notice 001 was attached to the petition of Nassau Sports, N.A.E. et al. partners.

During the course of the field audit, Sports executed a consent to extend the period of limitation for assessment of sales and use taxes. The consent form identifies the vendor as "NAE Inc., as general partner et al., D/B/A Nassau Sports".

The Division issued two conciliation orders, dated July 19, 1991, which reduced the amount of tax asserted to $135,725.51. Before the hearing commenced, the parties agreed that only three audit issues remain in dispute. These issues, and the amount of tax asserted with regard to each issue, are as follows: (1) whether Sports was required to pay sales tax on the amounts it paid for the upgrading of a scoreboard for the Coliseum ($41,250.00); (2) whether Sports was required to pay sales tax on amounts it paid to J. H. Electrical Corporation for services associated with the installation of television sets within the Coliseum ($9,064.59); and (3) whether Sports was required to pay sales tax on the value of seats used by the hockey team's owner, Sports' employees, and team medical personnel ($36,000.00). The parties refer to this as the "complimentary seats" issue.

The Scoreboard

A scoreboard (hereinafter the "Scoreboard") was installed in the Coliseum in 1972 when the Coliseum was first built. In photographs, the Scoreboard looks like a huge television set with screens on four sides, suspended from the ceiling of the Coliseum. In actuality, the Scoreboard was enormous. It was described by one witness as a small house, approximately 26 to 28 feet wide. The roof of the Coliseum had to be reinforced with steel girders to bear the weight of the Scoreboard which was approximately 22,000 to 24,000 pounds. The Scoreboard

was attached to the roof by cables and a winching system which allowed it to be raised and lowered to accommodate other events where it would not be needed. Cables and electric wires ran from the Scoreboard through the Coliseum to a control room where the Scoreboard was operated. The component parts of the Scoreboard were delivered on several trucks and assembled inside the Coliseum.

The Scoreboard was installed and owned by the County of Nassau. During the audit period, the Coliseum was operated by Facility Management of New York ("Facility"), as assignee of the County of Nassau (Facility was later replaced by Spectacor). A lease agreement was entered into by Sports, Nassau County and Facility for a 30-year period commencing on September 28, 1985. This lease agreement amended and extended an earlier lease agreement between Sports and the County of Nassau which was entered into in 1979. The 1985 lease agreement contains the following provisions:

> "1.1. The words and terms defined in this Article shall for all purposes of this Agreement, and any agreements supplemental hereto, whether used in the singular or the plural, have the following respective meanings:
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> * * *
>
> "'Coliseum' shall mean the land and structure known as the Nassau Veterans Memorial Coliseum located at Mitchell Field, Uniondale, New York, including the underground 60,000 square foot exhibition hall, all spaces and areas, enclosed or unenclosed, within or under said structure; together with all improvements, fixtures, machinery, equipment, ticket booths and other installations owned by County and used in connection with the operation of the Coliseum, and all permanent improvements, additions, alterations, fixtures, equipment and installations constructed, provided or added thereto at any time by County, Sports or any other Entity; together with the Coliseum Parking Lots.
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> * * *
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> "'Scoreboard' shall mean the Stewart-Warner Scoreboard presently suspended from the ceiling of the Sports Arena, containing advertising space and a clock with an integrated lighting system for goals and remaining playing time, and any replacements thereof.
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> * * *
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> "9.3 all alterations, decorations, installations additional or improvements made by either party upon the Demised Premises, including without limitation, all lighting, ceiling, paneling, decorations, partitions and railings, shall, unless County or its Assignee elects otherwise . . . become the property of County and shall remain upon, and be surrendered with, said premises, as a part thereof, at the the end of the term or

> renewal term as the case may be, provided, however, that this provision shall not apply to items which are not fixtures but are personalty and readily removable without damage to the Demised Premises.
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> * * *
>
> "13.1 In addition to making available to Sports the use and occupancy of the Demised Premises as set forth herein, County or its Assignee shall furnish to and, where applicable, operate for Sports during the periods of time set forth in 4.2 the following equipment and systems:
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> * * *
>
> "(iii) Scoreboard, to be maintained and operated as provided in Articles XX."

Pursuant to the lease agreement, Nassau County agreed to operate the Scoreboard and maintain it in good condition (¶¶ 14.1, 14.2, 20.2[A]) and to install and replace as necessary all structural supports to support and suspend the existing Scoreboard (¶ 20.2[A][ii]). The Scoreboard is defined in Article XX as follows:

> "all structural supports, cables, wires, pipes, conduits, related facilities, computers, equipment and other elements which are necessary to suspend the Scoreboard from the ceiling of the Sports Arena and which are necessary for the operation thereof, irrespective of the nature or classification of said supports, cables, wires, pipes, conduits, related facilities, computers, equipment and elements as fixtures, personal property or real property."

The original Scoreboard was upgraded in 1985 in conjunction with a larger renovation of the Coliseum undertaken by Sports. Scoreboards, gameboards and related equipment were purchased by Sports from White Way Sign Company which also acted as the contractor for installation of the new equipment. In a letter to White Way dated July 3, 1985, the contract between Sports and White Way was outlined. Included in the contract were certain items which the parties agree were subject to tax as the installation of tangible personal property, such as out-of-town gameboards. The only portions of the contract in issue here relate to the upgrading of the actual Scoreboard.[1] Among the services and items purchased from White Way were the

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[1]The Division placed in evidence a letter from White Way to the New York Islanders listing the equipment to be installed at the Coliseum. The Division was uncertain of how or when it gained possession of the letter or the significance of the letter to the issues raised here. It was received in evidence pursuant to SAPA § 306(2) which allows an agency to place in evidence all records and documents in its possession. The letter lists a number of items related to the Scoreboard, such as a computer control system, which on their face appear not to be capital

following:

> "3. Remodeling of existing four-sided Scoreboard changing existing scoring section and adding a four-sided 120 existing scoring section and adding a four-sided 120 lamp by 128 lamp four-color matrix per drawing #52066R.
>
> * * *
>
> "7. White Way shall supply all labor, material, equipment, and transportation necessary to construct and install the equipment, it being the intent that all equipment shall be complete and operative as of September 20, 1985.
>
> "8. White Way will pay all costs to provide and install primary wire, electrical feeders, switches, circuits, control cables and conduits. White Way will use the services of the electrical contractor presently working on the luxury suites being built as its electrical contractor for this work. Should the charge for this work be less than $30,000, White Way will give the Islanders a credit for the savings.
>
> "The established value for all equipment, installation and all services mentioned above shall be $498,000.00 plus any applicable taxes."

Purchase invoices from White Way Sign Company for charges associated with the renovation of the Scoreboard total $500,000.00. On audit, the Division determined that these receipts were subject to sales tax

as the purchase of fixed assets and the installation and repair of tangible personal property.

The upgrading or renovation of the Scoreboard required it to be completely gutted. All of the electronic components were removed so that nothing was left but the frame of the board itself. These components were replaced by White Way.

In 1990, Sports replaced the 1985 Scoreboard with a state-of- the-art video scoreboard. In order to remove the 1985 Scoreboard from the Coliseum, the entire mechanism had to be dismantled. The individual responsible for its removal and the installation of the new scoreboard described the removal of the old Scoreboard. It was hung from the rafters of the Coliseum, held by a cable which was attached to a winch system which was affixed to the roof supports in the center of the building. To remove the Scoreboard, it was lowered to the floor,

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improvements. Since the Division failed to lay any foundation for the letter or to make any arguments based on its contents, no weight was given to it as evidence that the upgrade of the Scoreboard included items subject to tax under Tax Law § 1105(c)(3).

taken off its cables and cut up with torches, saws and other equipment. The Scoreboard was reduced to scrap by this process. The entire process took a crew of 10 to 15 approximately a day and a half to complete. The roof of the Coliseum building required some repair and reinforcement as part of the removal of the old Scoreboard and installation of the new Scoreboard.

The individual who removed the 1972 Scoreboard and installed the new scoreboard in 1990 was asked whether removal was possible without totally destroying the old Scoreboard. He testified as follows:

> "I think if you had all the time in the world and highly skilled technicians, surgeons, I might say, yes, it would be possible but highly improbable."
>
> * * *
>
> "Because each nut and bolt would have to be disassembled, each cable would have to be broken away or taken away, each piece would have to be pulled out fragilely, marked and put aside, wrapped so that it could be reassembled. It could be done but it would be a very slow, tedious process. Highly unlikely." (Tr., December 14, 1992, pp. 52-53.)

In a letter to Facility's general manager dated January 19, 1990, the County of Nassau gave its permission for the replacement of the 1985 Scoreboard with the new scoreboard. In that letter, the County stated that the new scoreboard "shall be the sole property of the County of Nassau."

Electrical Work and Installation of Television Sets

As indicated in the letter to White Way Sign Company, in 1985 Sports was engaged in a major renovation of the luxury boxes and Sports' offices located in the Coliseum. The electrical subcontractor working on this project was J. H. Electric Corporation ("J.H."). Apparently, as the renovation proceeded Sports decided additional work was required. Rather than making continual changes to the existing construction contract, Sports separately contracted with J.H. to perform additional electrical work. A statement provided to Sports by J.H., dated December 11, 1985, lists the work which Sports hired J.H. to perform and the amount of each job as follows:

Floor Box	$ 250.00
Cablevision Box (9)	1,750.00
Pickett's Office	1,250.00

41 TV's	65,424.00	
45 TV Hook-ups		20,000.00
Extra #3	5,181.00	
Extra #4	400.00	
Extra #5	7,331.00	
Extra #6	1,760.00	
Total	$103,346.00	

A second statement, almost identical to the first and dated February 12, 1986, shows that two additional items were added to the contract, "Extra #7" which is described as "Hook up Computer Electric" and the installation of park heaters. These additional items brought the contract price to $112,886.00. The Division's worksheets show that after the BCMS conference it determined tax due on purchases from J.H. in the amount of $110,720.00 based on four J.H. invoices. The parties agree that the amount of tax now claimed to be due on these purchases is $9,064.59 which would indicate purchases in the amount of $109,873.81, based on a tax rate of 8¼ percent. These minor discrepancies were not explained by the parties.

In a sworn affidavit, Mr. Herrick, who is the president of J.H., explained the nature of the work performed by his company for Sports. He states:

> "2. During the period August 1985 to December 1985, my company performed the following work:
>
> "Installation of outlets, receptacles, switches, add-on panels, and other in-wall electrical wiring work in connection with the upgrade of electrical wiring which was necessitated by the installation of electrical appliances (such as televisions).
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> * * *
>
> "4. The attached December 11, 1985 sworn statement contains a notation for August 29, 1985 relating to "41 TV's." This notation and the notation below it for 45 TV's both relate to that portion of the scope of work that concerned the installation of television sets at various locations throughout the Coliseum, and further, that each such installation required the running of in-wall wires as well as the upgrading and/or original installation of circuits, switches, sockets, receptacles, outlets, etc. No part of the attached . . . statement relates to the sale of television sets, as my company is not in the business of and does not engage in the sale of televisions."

Petitioners offered a number of work orders, invoices, worksheets and other documents which also evidence the nature of the work performed by J.H. They show that the actual installation of the television sets, as opposed to the electrical work, was done by others. A statement entitled "Additional Work Authorization", dated September 20, 1985, contains the

notation "Pentagon to Install Brackets", apparently referring to the brackets needed to install the television sets. A similar statement, dated October 3, 1985, shows the additional work to be performed by J.H. as "Supply and install 24 TV coaxial homeruns. Hook up 45 TV's." Excluded from the price quoted for this work were the following items: all TV equipment, the delivery and mounting of the TV's, cable material and equipment, supervision of the cable television company, and a one-half inch cable feed. A second worksheet dated August 27, 1985, describes work to be performed by J.H. and work to be performed by others. The work to be performed by others included: "scoffling and access doors", steel required to support televisions, opening the ceilings for the televisions and cabinet and finish work.

According to the auditor's testimony, the J.H. contract indicated that some of the services performed were for the installation of property which became a capital improvement and some of the services were not. As an example of an installation not qualifying as a capital improvement, he mentioned the installation of an apparatus to bolt the television sets so they could not be stolen. The auditor testified that the entire contract amount was deemed subject to sales tax because the contract was not detailed enough to enable the Division to determine what elements of the contract were taxable and which were not.

Complimentary Seating

The information provided regarding the Division's determination of tax due on the price of certain tickets is sketchy. The audit report contains the following explanation of the Division's assessment in this area:

> "Taxpayer withholds a certain number of tickets per game for complimentary seating, on which use tax is due. Since the actual number of seats withheld were [sic] not provided (even though requested numerous times), this was estimated based on the prior audit. The actual ticket prices were available. Use tax due on complimentary seating is $42,086.03."

A worksheet prepared by the Division in connection with the conciliation conference in BCMS shows the Division's revised calculation of tax due on complimentary seating. The Division determined that Sports withheld tickets on 165 seats per game. Of the total, 34 seats were found to be seats in the luxury boxes at ticket prices of $25.00 to $30.00; 60 tickets were

reserved for the hockey players at a price of $21.00 to $27.00 per seat; and 71 tickets were reserved for employees at a price of $16.00 to $20.00 per seat. The Division estimated use tax due on these seats of $36,084.35.

According to the testimony of Mr. Selletti, Sports' comptroller, the Division's determination of the number of ticket seats distributed per game was a close approximation of the actual number. Petitioners provided no evidence of their own of the exact number of tickets Sports distributed, although Mr. Selletti testified that the total number of complimentary tickets distributed per game was approximately 260 to 270. Petitioners provided a description of the complimentary seats provided by Sports to its employees, owners and players.

Under the terms of its collective bargaining agreement with the hockey players, Sports was required to provide each player with two free tickets to each game. According to the testimony of Mr. Selletti, approximately 50 tickets were distributed to the players per game. The players were allowed to pick up their tickets in a Sports' office a few days before the game.

Sports distributed 50 to 60 tickets to employees who were required to be present at each game. Some of these employees were medical and ambulance staff who were on standby in case of injury. Others were office personnel who were required to attend all games as part of their duties. For instance, they observed other employees to ensure that proper policies and procedures were being followed. They also performed a public relations function, mingling with and talking to the fans. They were present to resolve problems with security, lost tickets or any other situations which might arise. The Coliseum management required every person present at a game to sit in a seat. As a consequence, each employee who was required to attend a game was given a ticket for a seat. Mr. Selletti stated that the seats given to employees were in areas with restricted views and were sold to the public only if a game was otherwise sold out. Approximately 48 seats were reserved for employees whether a game was a sellout or not.

There were 20 tickets per game available to the team owner in the owner's box. The tickets were reserved for the owner's exclusive use whether he used them or not.

A box called the manager's perch had 14 seats in it. It was described as an unfinished

luxury box used by the team manager and his staff to observe the hockey team's performance. Entry to the manager's perch was described by Mr. Selletti.

> "They would have to walk down the end of the hall where the regular suites end and there is a fire door and they would have to go through some piping and down a flight of cement steps and come up on the other side in an area that's not finished off, a basement-type atmosphere, and come up through a separate door and go into this one little section." (Tr., November 16, 1992, p. 79.)

The manager was given tickets for the 14 seats in this box. These seats were never for sale to the general public. The box itself was part of the seating plan for the hockey games but not for other Coliseum events.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners claim that the Division of Tax Appeals has jurisdiction over the petition of Nassau Sports, N.A.E., Inc., et al. partners, assessment number S890920001N, (hereinafter "Nassau Sports") for two reasons. First, petitioners argue that assessment 001 and assessment 002 are duplicative and, in fact, assess the same amount of tax against the same persons for the same tax periods, using the same Federal identification number to identify the taxpayer. Thus, they argue that the petition filed on behalf of N.A.E, Inc., General Partner et al., D/B/A Nassau Sports should be deemed to include Nassau Sports as a petitioner. Second, petitioners claim that Sports never received the notice of determination issued to Nassau Sports. They point out that the certified mail receipt entered in evidence by the Division was signed by an employee of an unrelated corporation with offices in the same building as Sports. They cite Matter of Ruggerite v. Dept. of Taxation and Fin. (97 AD2d 634, 468 NYS2d 945) to support their position that since Sports never received the notice of determination its petition must be deemed timely.

Finally, petitioners maintain that the assessment issued to Nassau Sports is time-barred because the consent to extend the period of limitation for assessment of tax refers only to the general partner, N.A.E., Inc., and not to the partnership, Nassau Sports.

Petitioners assert that as a limited partner Robin Pickett is not liable for taxes due from Sports.

Petitioners contend that the upgrading of the Scoreboard in 1985 was not subject to sales tax. Since the Scoreboard was the property of Nassau County, both before and after its upgrade in 1985, petitioners claim that the upgrade of the Scoreboard was exempt from tax under Tax Law §§ 1115(a)(15) and 1116(a)(1). In the alternative, petitioners claim that the upgrade of the Scoreboard, as well as the work done by J.H., resulted in capital improvements, exempt from tax under Tax Law §§ 1105(c)(3) and 1115(a)(17).

Petitioners argue that the tickets given to employees, players and the owner are not subject to tax. They note that the employees were required to attend the hockey games as a condition of their employment, and the tickets served as passes which allowed them to enter the building and sit in the auditorium. They maintain that the employees' attendance at the games was not a benefit to the employees.

It is the Division's position that the Division of Tax Appeals has no jurisdiction over the petition of Nassau Sports because the petition was not filed within 90 days of the mailing of the notice of determination to Nassau Sports. According to the Division, the three notices of determination clearly demonstrate that they were issued to three different persons: the partnership, Nassau Sports; the general partner, N.A.E., Inc.; and the limited partner, Robin Pickett. Since two separate notices were issued with separate assessment numbers, the Division contends that separate requests for conciliation conferences were required. The Division did not respond to petitioners' contention that the notice issued to Nassau Sports was barred by the statute of limitations. The Division placed in evidence a certified mail receipt showing delivery of the notice of determination addressed to Nassau Sports, but it did not address petitioners' contention that the person signing the receipt was not an employee or agent of Nassau Sports. The Division introduced no mailing documents to establish the date and fact of mailing of the notice of determination to Nassau Sports.

The Division maintains that whether Robin Pickett is liable for the debts of the partnership under New York's Partnership Law is immaterial. It is the Division's position that Robin Pickett was a person required to collect tax under Tax Law § 1131(1) and 1133(a)(1) and

notes that petitioners presented no evidence to show that Robin Pickett was not such a person.

The Division argues that petitioners failed to carry their burden of proof to show that the upgrade of the Scoreboard and the work done by J.H. constituted capital improvements. The Division did not respond to petitioners' contention that amounts paid for the upgrade of the Scoreboard were exempt from tax because the Scoreboard is owned by Nassau County.

The auditor expressed the Division's position with regard to the complimentary seating issue as follows:

> "According to our interpretation of the law, anyone who has the right to use a seat has to pay use tax on that seat even if there is no compensation involved. So it was our interpretation that since Nassau Sports had control over these blocks of seats for the entire season, they would owe us use tax."

CONCLUSIONS OF LAW

A. The parties have raised a number of issues with regard to whether the Division of Tax Appeals has jurisdiction over the petition of Nassau Sports. These must be addressed at the outset.

The Division's contention that notice numbers 001 and 002 are not duplicative and do not constitute identical determinations of tax due pursuant to Tax Law § 1138(a)(1) is rejected. The content of a notice of determination issued pursuant to Tax Law § 1138(a)(1) is not prescribed by statute (except to the limited extent provided for in section 1138[a][2] which is not pertinent here). Therefore, it is appropriate to interpret the notices as a common reader would. The Division asserts that notice number 001 was intended to assess tax against the partnership, Nassau Sports, and notice number 002 was intended to assess tax against the general partner, N.A.E., Inc., but the notices themselves do not evidence the distinction. Notice number 002, which the parties agree was timely petitioned, was issued to N.A.E., Inc., as general partner, "et al, d/b/a/ Nassau Sports". N.A.E., Inc. is the only general partner of Nassau Sports. The phrase "et al." is the abbreviated form of the Latin phrase et alii meaning "and others" (Dictionary of Modern Legal Usage, 1987). Thus, the notice was issued to N.A.E., Inc., as general partner, and others doing business as Nassau Sports. It is apparent that the partnership, Nassau Sports, was doing business as Nassau Sports and, consequently, was one of the parties assessed by

notice of determination number 002. For the same reason, I reject petitioners' contention that the consent to extend the statute of limitation does not apply to Nassau Sports. The consent form identifies the vendor as "NAE Inc. as General Partner et al. D/B/A Nassau Sports" and, hence, includes both N.A.E., Inc. as the general partner and any other partners, as well as the partnership, Nassau Sports.

Petitioner Nassau Sports filed a separate petition on November 26, 1991, attaching a copy of a notice of determination, assessment number 001, dated September 20, 1989. In its answer, the Division raised an affirmative defense to the petition by asserting that the petition is untimely. Where the Division raises such a defense, it bears the burden of establishing both the fact and date of mailing of the notice of determination (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). The proof required consists of evidence of a standard procedure for the issuance of such notices offered by one with personal knowledge of such procedures and evidence that establishes that the procedure was followed in the particular case under consideration (Matter of Katz, Tax Appeals Tribunal, November 14, 1991).

The Division offered no evidence at all of the mailing of the notice of determination to Nassau Sports and, thus, failed to establish either the fact or date of mailing of the notice. It did offer in evidence a certified mail receipt showing that an item of mail addressed to Nassau Sports was delivered by the United States Postal Service and received by a person identified as "K. Johnson". Without any evidence of mailing of the notice of determination, such as a certified mailing record, it is not possible to associate the certified mail receipt with the notice of determination. Moreover, petitioners submitted evidence establishing that "K. Johnson", was not an employee or agent of Nassau Sports but worked as a receptionist for an unrelated corporation located in the Coliseum building. This lends credibility to petitioners' claim that the notice of determination (assessment number 001) was not received by Nassau Sports until a copy of the notice was obtained sometime after a warrant was filed. Consequently, the signed certified mail receipt is not sufficient to prove that the notice of determination addressed to

Nassau Sports, and others, was mailed by certified or registered mail as required by Tax Law § 1147(a)(1) or that the notice of determination was actually received. Since the mailing of a notice has not been proven but Nassau Sports received a notice, it is appropriate to deem the petition filed with the Division of Tax Appeals to be timely and to grant a hearing to Nassau Sports on the petition (see, Matter of Novar TV & Air Conditioner Sales & Serv., supra).

B. Pursuant to Tax Law § 1133(a) any person required to collect any tax imposed by article 28 shall be personally liable for the tax imposed. Tax Law § 1131(1) includes within its definition of a "person required to collect any tax imposed by [article 29]" "any member of a partnership", without qualification. Petitioners argue that as a limited partner Robin Pickett is not liable for the debts of the partnership under section 96 of the New York State Partnership Law.

Robin Pickett's liability for sales tax due from Nassau Sports is not grounded in the laws of partnership, but in the Tax Law which explicitly places liability on all members of a partnership. The Tax Law does not distinguish between limited and general partners. Petitioners presented no evidence with regard to Robin Pickett's relationship to the partnership. Petitioners repeatedly asserted that Robin Pickett was a limited partner, and they based their entire claim that Robin Pickett is not liable for sales tax on that assertion. Yet, they failed to place evidence in the record to establish that Robin Pickett was, in fact, a limited partner. Moreover, they did not address, either factually or through legal argument, whether Robin Pickett is a "person required to collect any tax imposed by [article 29]". Accordingly, they have failed to carry their burden of proof to show that Robin Pickett is not individually liable for sales and use taxes due from Nassau Sports.

C. Petitioners claim that the upgrade of the Scoreboard originally installed in 1972 is not subject to sales tax for two reasons. First, petitioners claim that because the Scoreboard is the property of Nassau County the upgrade of the Scoreboard is exempt from taxation under Tax Law §§ 1115(a)(15) and 1116(a)(1). Second, they contend that the upgrade of the Scoreboard was a capital improvement and, for that reason, purchases made by Sports in connection with

that upgrade are exempt from taxation under Tax Law §§ 1105(c)(3)(iii) and 1115(a)(17). I will first address the question of whether, upon installation, the Scoreboard lost its character as tangible personal property and became a capital improvement.

The determination of whether a certain project constitutes a capital improvement rests on a detailed analysis of the facts, as slightly different facts can produce a different tax result, and the burden of proving that a particular project was a capital improvement rests with the petitioner (see, Matter of Airport Industrial Park, Tax Appeals Tribunal, April 11, 1991). After analyzing all the facts presented by petitioners, I conclude that they have carried this burden.

Tax Law § 1105(c)(3) imposes tax on receipts from the sale of the following services:

> "Installing tangible personal property, . . . or maintaining, servicing or repairing tangible personal property . . . except:
>
> * * *
>
> "(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter." (Emphasis added.)

Tax Law § 1101(b)(9)(i) defines a capital improvement as any addition or alteration to real property which:

> "(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
>
> "(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
>
> "(C) Is intended to become a permanent installation."

There is no question that the Scoreboard substantially added to the value of the Coliseum building. Although the cost of the original Scoreboard is not in the record, the cost of the 1985 upgrade was approximately $500,000.00. Moreover, the lease agreement establishes that both Nassau County and Sports saw the Scoreboard as adding substantial value to the Coliseum. Thus, the first condition for finding that the Scoreboard constituted a capital improvement has been met.

The next question is whether the Scoreboard became part of the realty or was

permanently affixed to it so that its removal would cause material damage to the Scoreboard or the building itself. Closely related to this question is whether the Scoreboard was intended to be a permanent installation.

There is no doubt that installations of the 1972 and 1990 Scoreboards and the 1985 upgrading were major projects of a highly complex nature. There is substantial evidence in the record that the removal of the 1972 Scoreboard in 1990 was accomplished only by completely demolishing the Scoreboard. The Division argues that the fact of the removal of the Scoreboard is itself evidence that the Scoreboard was not intended to be a permanent fixture. The Division also points out that the Scoreboard was attached to the Coliseum by cables and was not directly affixed to the building structure. Although these facts must be considered in weighing petitioners' position, they do not preclude a finding that the Scoreboard was a permanent installation.

The size and nature of the Scoreboard suggest that its installation was intended to be permanent. It was described as being about 26 to 28 feet wide and weighing about 22,000 pounds. It was delivered to the Coliseum in pieces and assembled inside the building. Once installed it could only be removed from the building by dismantling it. When the 1972 Scoreboard was replaced, it was totally demolished. Although, as the Division suggests, it conceivably could have been dismantled in a way that would allow it to be reassembled in a different place, the cost of doing so was prohibitive. Entire medieval buildings have been disassembled in Europe, transported to America and rebuilt in their new location. This does not prevent them from being deemed real property. It is also significant that the roof of the Coliseum required some repair after the 1972 Scoreboard was removed. Where the only practicable way of removing a fixture is by demolishing the fixture itself and damaging the roof of the building to which it is attached, the second condition of Tax Law § 1101(b)(9)(ii) has been met (cf., Matter of Dairy Barn Stores, Tax Appeals Tribunal, October 5, 1989 [where certain freezer units were found to have been permanently affixed to real property by their size and weight which made it impracticable to move them without cutting them apart]). Other

evidence also establishes that, upon installation, the Scoreboard was intended to be a permanent fixture. As the lease agreement makes clear, the Scoreboard was the property of Nassau County. Although Sports bore the cost of upgrading the 1972 Scoreboard and replacing it in 1990, both Scoreboards remained the property of Nassau County. Ownership of the Scoreboard by Nassau County is an additional factor suggesting that the Scoreboard was intended to be a permanent installation, since "[a]n owner is much more likely to intend permanency than one in possession of premises temporarily, as for example a tenant" (Marine Midland Trust Co. v. Ahern, 16 NYS2d 656, 660, quoted in Matter of Dairy Barn Stores, supra). Since all three conditions of Tax Law § 1101(b)(9) have been met, the 1972 Scoreboard must be deemed to be a capital improvement to real property. The final question to be answered is whether the upgrade or renovation of the Scoreboard is also a capital improvement.

In order to upgrade the Scoreboard, it was necessary to completely gut it. No usable parts remained except the steel frame. Petitioners analogized the gutting of the Scoreboard and the installation of new electronic parts to completely gutting and renovating a building. It cannot be doubted that the Scoreboard's new "insides" added value to the Scoreboard. The record shows that removal of the electronic components installed in 1972 caused those components to be damaged to the extent of reducing them to scrap; thus, the second condition of section 1101(b)(9) was met. The record establishes that the upgraded components were intended to be permanent when they were installed. Again, the Scoreboard was owned by Nassau County. This fact, plus the very nature of the installation, indicates that permanency was intended. Thus, by definition the property installed in the Scoreboard in 1985 became a part of the real property (see, Matter of Rochester Gas and Elec. v. Tax Commn., 128 AD2d 238, 516 NYS2d 341, affd 71 NY2d 931, 528 NYS2d 810 [where the installation of superheater units to boilers was found to constitute a capital improvement inasmuch as they were permanently affixed to the boilers and their removal would result in damage to the superheaters]).

It may seem contradictory that property which was removed within five years of being installed is being deemed to be a permanent installation. However, it must be remembered that

almost any capital improvement, including walls, ceilings and roofs, can be removed. 20 NYCRR 527.7(b)(4), Example 9, gives as an example of a capital improvement the installation of a new shingle roof. Consequently, the mere fact that the 1972 Scoreboard was replaced in 1990 does not establish that the original installation and the renovation were not capital improvements.

The upgrade to the Scoreboard was also exempt from sales tax under Tax Law §§ 1116(a)(1) and 1115(a)(15). Tax Law § 1116(a)(1) provides, as pertinent:

> "(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:
>
> "(1) The state of New York . . . or political subdivisions where it is the purchaser, user or consumer . . . ." (Emphasis added.)

Tax Law § 1115(a)(16) provides:

> "Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land of an organization described in subdivision (a) of section eleven hundred sixteen, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property" (emphasis added).

According to the Division's own interpretation of section 1115(a)(15), materials purchased by a tenant, its contractors, subcontractors or repairmen and used in adding to, altering, improving, maintaining, servicing or repairing real property owned by an entity exempt from tax under Tax Law § 1116(a)(1) and which become integral component parts of the real property owned by such an entity are exempt from sales and compensating use tax (see, Citibank, N.A., Advisory Op., Commr. of Taxation and Fin. [TSB-A-88(9)S]; 450 Lexington Venture, Advisory Op., Commr. of Taxation and Fin. [TSB-A-89-(8.1)S]). Petitioners argue that the upgrades became an "integral component part" of the Scoreboard. Since the upgrades have been found to constitute capital improvements, they must also be deemed to be integral component parts of the Scoreboard. Thus, the services performed and materials purchased by Sports in connection with upgrading the Scoreboard were exempt from taxation.

D. Petitioners claim that work performed by J.H. constituted capital improvements to real property. The greatest portion of that work consisted of installing electrical wiring, panels and outlets and running television cables in the luxury suites which were then being renovated. All of the electrical work performed constituted capital improvements to real property. The auditor testified that the J.H. contract also showed the installation of property that was not intended to be permanent, such as the brackets to hold the television sets, and because the Division could not determine charges made for the installation of property intended to be capital improvements and other items, it deemed all charges to be taxable. The invoices and other documents offered in evidence by petitioners show that the services performed by J.H. involved the installation of tangible personal property which was permanently affixed to the real property or intended to be a permanent installation. Other services related to the overall installation of the television sets, e.g., installing brackets, mounting the television sets to the brackets, connecting television cables to the television sets, were performed by other subcontractors. The evidence submitted does not segregate any of the charges for the services performed by J.H. and the subcontractors. So, for instance, while the record shows that a subcontractor actually installed the television sets, it cannot be determined whether the charge for doing so (a taxable charge under Tax Law § 1105[c][3]) was included in the J.H. contract and the amounts paid to J.H. by petitioner or was billed separately by the subcontractor. Petitioners admit that the invoices submitted by J.H. were lacking in detail and fail to itemize charges for the work performed. Some of the charges remain a mystery, for example, "Extra #3, Extra #4 and Extra #5". Petitioners rely on the affidavit of Mr. Herrick, president of J.H., and the testimony of Sports' comptroller to establish that all of the work performed under the J.H. contract was in the nature of a capital improvement. However, a certain amount of vagueness and confusion remains. The confusion in the record must weigh against petitioners, who had the burden of showing, by clear and convincing evidence, that all of the work performed was excluded from sales tax as a capital improvement. On this record, I cannot find that petitioners carried their burden. For the same reasons, petitioners have failed to show that all services performed under

the J.H. contract were for the installation of property which became an "integral component part" of the structure or building under Tax Law § 1115(a)(16).

E. The final issue to be addressed involves the Division's imposition of tax on what the parties refer to as "complimentary seating".

Tax Law § 1105(f)(1) imposes sales tax on any admission charge in excess of ten cents for admission to a place of amusement. As pertinent here, it also provides as follows:

> "For any person having the permanent use or possession of a box or seat or a lease or a license, other than a season ticket, for the use of a box or seat at a place of amusement, the tax shall be upon the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by the holder, licensee or lessee, and shall be paid by the holder, licensee, or lessee." (Emphasis added.)

Since the issue here is whether certain transactions are subject to taxation under Tax Law § 1105(f)(1), thereby involving an exclusion from tax, the statute must be strictly construed in favor of petitioners, and the words of the statute must be interpreted as an ordinary person would interpret them (Matter of Grace v. State Tax Commn., 37 NY2d 193, 196, 371 NYS2d 715; see also, Matter of Outdoor Amusement Business Assoc. v. State Tax Commn., 84 AD2d 950, 447 NYS2d 69, revd 57 NY2d 790, 455 NYS2d 586 [where the Appellate Division specifically applied these principles of statutory construction to Tax Law § 1105(f)(1), although the court's holding that charges for participating in carnival games are subject to tax was reversed]).

The Division has provided its construction of Tax Law § 1105(f)(1) as it applies to free admissions in a Technical Services Memorandum (TSB-M-78-[16]S, August 30, 1978) where it states that free or complimentary tickets furnished for athletic events are not subject to the tax imposed under Tax Law §§ 1105(f)(1) or 1110. The memorandum goes on to state:

> "'Boxes' which are assigned and reserved for corporate purposes, and to officials of or stockholders in an organization, are subject to the tax imposed under section 1105(f)(1) of the Tax Law."

The evidence shows that a box was reserved for the team owner's exclusive use for the entire season. There can be no question that the owner's personal use of the box was taxable under section 1105(f)(1). Petitioners argue that the Division failed to inquire into the owner's

actual use of the box and the actual number of seats in the box. Inasmuch as petitioners were aware of the basis for the Division's calculation of tax due, it was their burden to show the actual value of the seats in the owner's box. Petitioners offered no evidence on this subject and thus have not shown that the Division's estimate of 20 tickets per game allotted to the owner's box is unreasonable. However, petitioners have established that the 14 tickets per game allotted to the manager's perch are not subject to tax under section 1105(f)(1).[2] The manager's perch was an unfinished box, the box was not accessible to the public, and the seats in the box were never sold to the public. Since no "similar box or seat" was ever sold to the public, the use of the box by the team manager and his staff to oversee the performance of the players had no value. The Division is directed to

recompute the tax due on "luxury boxes" by reducing the number of seats per game in this category from 34 to 20.

I find that the seats used by Sports' office employees, medical staff and ambulance drivers were not subject to tax because those persons did not have permanent use or possession of the seats involved. The record establishes that tickets were distributed to the employees before the games for the sole purpose of enabling those persons to be present in the Coliseum as needed. The employees and medical staff did not have "permanent use or possession" (Tax Law § 1105[f]) of a seat, as the owner did. Rather, the seats were distributed at the discretion of Sports. It may be the Division's theory that the employee seats were subject to tax because they were "reserved for corporate purposes" (TSB-M-78-[16]S, supra), i.e., for use by Sports to ensure attendance at games by necessary personnel. I do not believe that the statutory provision

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[2]In his testimony, the Division's auditor stated "anyone who has the right to use a seat has to pay use tax on that seat even if there is no compensation involved." I cannot be certain whether the auditor's reference to "use tax" was intended to suggest that the use of the seats was subject to tax under Tax Law § 1110, the compensating use tax provision, or not. Since the Division never cited any provision of the Tax Law to support its determination of tax due on complimentary seating, this possibility cannot be totally ignored. It is sufficient to note here that the compensating use tax is not imposed on admission charges subject to sales tax under Tax Law § 1105(f).

can be interpreted so broadly as to include any reservation of seats for a corporate purpose. To do so would be to impose a compensating use tax on admission charges by statutory construction of Tax Law § 1105(f)(1). When the Legislature intended a compensating use tax, it explicitly imposed one (Tax Law § 1110). Since the Legislature did not impose the compensating use tax on admission charges, it would be inappropriate to construe section 1105(f)(1) as imposing such a tax.

Presumably, the distribution of "free" or "complimentary" tickets for public relations purposes or charitable purposes serves a corporate purpose and thus all free tickets would be subject to tax. The statute, however, speaks of "permanent use or possession" of a box or seat. Therefore, the statute must be construed to impose the tax only where a person receives permanent use or possession of a particular box or seat for the duration of the hockey season. Under this standard, the tax is not imposed on seats given to employees on a game-by-game basis as their attendance is needed. Applying the same standard to seats provided to the hockey players, I find that those seats were not subject to taxation. The record establishes that each player had two tickets reserved for him for each game; however, a player did not have permanent use or possession of a particular seat or box for the duration of the season. Accordingly, the Division is directed to cancel the tax imposed on the employee and player seats.

F. The petition of Nassau Sports, N.A.E., Inc., et al. partners is granted to the extent indicated in Conclusions of Law "A", "C", and "E"; the notice of determination issued on September 20, 1989 shall be modified accordingly; and in all other respects the petition is denied.

G. The petitions of N.A.E., Inc., General Partner, et al. d/b/a Nassau Sports and Robin Pickett are granted to the extent indicated in Conclusions of Law "C" and "E"; the notice of determination issued on September 20, 1989 shall be modified accordingly; and in all other respects the petitions are denied.

DATED: Troy, New York
November 18, 1993

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE